

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELMER L. O'CONNELL,)	
)	No. CV-08-123-CI
Petitioner,)	
)	REPORT AND RECOMMENDATION
v.)	TO GRANT RESPONDENT'S
)	MOTION TO DISMISS ALL
JEFF UTTECH,)	CLAIMS WITH PREJUDICE
)	
Respondent.)	

BEFORE THE COURT on Report and Recommendation is Respondent's Answer and Memorandum of Authorities, which the court construes as a Motion to Dismiss under Rule 8, RULES GOVERNING § 2244 CASES.¹ (Ct. Rec. 12, 18.) Petitioner, who is proceeding pro se, is currently imprisoned at the Washington State Penitentiary in Walla Walla, Washington; Assistant Attorney General Ronda D. Larson represents Respondent. The parties have not consented to proceed before a magistrate judge.

FACTS

Petitioner is in the custody of the Washington State Department of Corrections under a 2001 jury conviction for first degree robbery

¹ Also before the court is Petitioner's "Traverse Evidentiary Hearing Requested" which the court construes as a Reply. (Ct. Rec. 15.)

1 and attempt to elude a police vehicle, committed on April 21, 2001.
2 (Ct Rec. 13, Exhibit 1.)² The trial court (Spokane County Superior
3 Court Judge Maryann Moreno) sentenced Petitioner to life without
4 possibility of release under the State's habitual offender statute.
5 (Exhibit 17.) Attorney Richard Fasy represented Petitioner
6 throughout his trial.

7 The facts were summarized by the state court of appeals:

8 Late one night in April 2001, Mr. O'Connell assaulted
9 a woman acquaintance, pushed her out of her car, and drove
10 off in her car with her purse. Relevant to these facts,
11 he was later arrested and charged with first degree
12 robbery and attempt to elude.¹ RCW 9A.56.190; RCW
13 46.61.024.

14 At trial, defense counsel argued that Mr. O'Connell
15 did not have the ability to form the intent to commit
16 first degree robbery on the night of the incident because
17 he had been very intoxicated and had been abusing
18 methamphetamine and crack cocaine for several days. The
19 victim testified that Mr. O'Connell had appeared very
20 agitated that night and made frequent, prolonged trips to
21 the bathroom (suggesting drug use), but she did not think
22 he appeared intoxicated. The defense offered the
23 testimony of Dr. Scott Mabee, a psychologist, who stated
24 that Mr. O'Connell was likely intoxicated at the time of
25 the incident, due to his high level of drug dependency and
26 his low level of mental functioning. Noting that Mr.
27 O'Connell reported daily drug use for the past three
28 years, Dr. Mabee opined that Mr. O'Connell had diminished
mental processes due to substance intoxication.

The jury found Mr. O'Connell guilty as charged. He
was sentenced for these convictions as well as for the
second degree robbery and related eluding convictions from
another trial. See note 1. Because first degree robbery
is a most serious offense (former RCW 9.94A.030(25)(a);
former RCW 9A.56.200), and because he had been convicted
on two previous occasions of most serious offenses, the
trial court imposed a life sentence without possibility of
early release.

² References to Exhibits in the State Court Record (Ct. Rec.
18) are cited to as "Exhibit ____." The record is available in paper
format at the U.S. District Court Clerk's Office.

1 Mr. O'Connell appealed his judgment and sentence to
2 this court, which reversed the counts for second degree
3 robbery and the related charge of eluding. *State v.*
4 *O'Connell*, noted at 116 Wn. App. 1010 (2003). In June
5 2003, the sentencing court mistakenly resentenced Mr.
6 O'Connell using an offender score that included the
7 eluding conviction that was related to the dismissed
8 second degree robbery conviction. On November 5, 2004, he
9 was resentenced to life without the possibility of
10 release. He filed an appeal of this judgment and sentence
11 three days later. His personal restraint petition was
12 filed on July 5, 2006.

13 ¹Mr. O'Connell was charged in the same
14 information with four additional counts related
15 to an earlier purse snatching and a later
16 robbery. A separate trial was held on the
17 purse snatching counts, and a jury found him
18 guilty of second degree robbery and eluding.
19 The remaining two counts were dismissed. This
20 court reversed the second degree robbery and
21 related eluding convictions in *State v.*
22 *O'Connell*, noted at 116 Wn. App. 1010 (2003).

23 (Exhibit 3 at 2-4.)

24 PROCEDURAL HISTORY

25 Petitioner, through appellate counsel, timely appealed his
26 amended judgment and sentence to the Washington State Court of
27 Appeals (Court of Appeals). (Exhibit 4.) Petitioner also filed a
28 pro se Statement of Additional Grounds in support of his direct
appeal. (Exhibit 6.) While the direct appeal was pending, he filed
a pro se personal restraint petition (PRP) with the Court of
Appeals, which consolidated the direct appeal and the PRP. Both
were denied in a published opinion. (Exhibit 3.) Thereafter, he
petitioned the Washington State Supreme Court for discretionary
review. (Exhibit 11.) Review was denied and the Court of Appeals
issued its mandate on February 28, 2008. (Exhibit 13.) Petitioner
filed this federal Petition for Writ of Habeas Corpus on April 14,
2008. (Ct. Rec. 1, 5.)

FEDERAL HABEAS CLAIMS

Petitioner seeks federal habeas relief on grounds that he received ineffective assistance of counsel due to counsel's (a) failure to request a lesser included offense instruction regarding the robbery count; (b) failure to request a lesser included offense instruction regarding the attempt to elude count; (c) request for a voluntary intoxication instruction not supported by the evidence; and (d) failure to interview and call defense witnesses. (Ct. Rec. 2 at 5.) Petitioner also claims the cumulative effect of these errors deprived him of a fair trial. (Ct. Rec. 2 at 32.)

EXHAUSTION OF STATE REMEDIES

Petitioner exhausted his claims in state court within the meaning of 28 U.S.C. § 2254(b).

EVIDENTIARY HEARING

Petitioner argues an evidentiary hearing is required on all of his federal habeas claims. (Ct. Rec. 2, 15.) State court findings are presumed correct in federal habeas proceedings. 28 U.S.C. § 2254 (e)(1). If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court may not hold an evidentiary hearing on the claim unless the applicant shows:

(A) the claim relies on:

(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

1 28 U.S.C. § 2254(e)(2). A hearing is not required if the claim
2 presents a purely legal question, or if the claim may be resolved by
3 reference to the state court record. *Campbell v. Wood*, 18 F.3d 662,
4 667 (9th Cir. 1994), *cert denied*, 511 U.S. 1119 (1994). Petitioner's
5 PRP in the state court record and his Reply include exhibits in
6 support of his claims. (Exhibit 8, Ct. Rec. 15.) The state record
7 is adequate to review Petitioner's allegations of ineffectiveness of
8 counsel and cumulative error. Accordingly, Petitioner is not
9 entitled to an evidentiary hearing in federal court. *Baja v.*
10 *Ducharme*, 187 F.3d 1075, 1077-78 (9th Cir. 1999), *cert. denied*, 528
11 U.S. 1079 (2000).

12 STANDARD OF REVIEW

13 Pursuant to the Antiterrorism and Effective Death Penalty Act
14 of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), federal habeas
15 relief from a state court judgment will be granted when a petitioner
16 demonstrates the state court's adjudication of the claim on its
17 merits "resulted in a decision that was contrary to, or involved an
18 unreasonable application of, clearly established Federal law, as
19 determined by the Supreme Court of the United States," 28 U.S.C. §
20 2254(d); in other words, if it applied a legal rule which
21 contradicts a prior United States Supreme Court holding. *Ramdass v.*
22 *Angelone*, 530 U.S. 156, 165 (2000) (*citing Williams v. Taylor*, 529
23 U.S. 362 (2000)). Relief is also appropriate "if, under clearly
24 established federal law, a state court has been unreasonable in
25 applying the governing legal principle to the facts of the case."
26 *Id.*

27 In *Williams*, 529 U.S. at 379, the Court announced the "clearly
28 established federal law" standard of § 2254(d)(1) is the equivalent

1 of the "old rule" standard under *Teague v. Lane*:

2 In *Teague v. Lane*, 489 U.S. 288 (1989), we held that
3 the petitioner was not entitled to federal habeas relief
4 because he was relying on a rule of federal law that had
5 not been announced until after his state conviction became
6 final. The anti-retroactivity rule recognized in *Teague*,
7 which prohibits reliance on "new rules," is the functional
8 equivalent of a statutory provision commanding exclusive
9 reliance on "clearly established law." Because there is
10 no reason to believe that Congress intended to require
11 federal courts to ask both whether a rule sought on habeas
12 is "new" under *Teague* - which remains the law -- and also
13 whether it is "clearly established" under AEDPA, it seems
14 safe to assume that Congress had congruent concepts in
15 mind. It is perfectly clear that AEDPA codifies *Teague* to
16 the extent that *Teague* requires federal habeas courts to
17 deny relief that is contingent upon a rule of law not
18 clearly established at the time the state conviction
19 became final.

20 The Court further observed a rule is "old" or, in other words, a law
21 is clearly established under *Teague*, if it was "dictated by
22 precedent existing at the time the defendant's conviction became
23 final." *Williams*, 529 U.S. at 381 (*citing Teague*, 489 U.S. at 301).
24 In contrast, a rule that "breaks new ground or imposes a new
25 obligation on the States or the Federal Government," is a "new
26 rule," and in this context, would not be a "clearly established"
27 law. *Williams* confirmed the principle that "apart from the Supreme
28 Court, federal habeas courts ought not act as innovators in the
field of criminal procedure, thereby upsetting state convictions
because state courts were not prescient and thus failed to comply
with federal law that did not exist at the time they ruled."
O'Brien v. Dubois, 145 F.3d 16, 23 (1st Cir. 1998) (*overruled on*
other grounds by McCambridge v. Hall, 303 F.3d 24 (1st Cir. 2002)).
Thus, under § 2254(d)(1), the threshold question for a reviewing
court is whether the rule of law a petitioner seeks to apply "was
clearly established at the time his state court conviction became

1 final." *Williams*, 529 U.S. at 390. If the rule of law was clearly
2 established, then the court next determines whether the state
3 court's decision was either "contrary to or involved an unreasonable
4 application of" that rule of law. *Id.* at 391; see also *Baker v.*
5 *City of Blaine*, 221 F.3d 1108, 1110 n.2 (9th Cir. 2000) (addressing
6 unreasonable application prong).

7 The Supreme Court has held the clauses "contrary to" and
8 "unreasonable application of" have independent meaning. *Penry v.*
9 *Johnson*, 532 U.S. 782, 792 (2001); *Williams*, 529 U.S. at 404.
10 Therefore, the first prong under § 2254(d) requires a two-step
11 analysis.

12 Under the "contrary to" clause, a state court's decision must
13 be "substantially different from the relevant precedent" of the
14 Supreme Court before a federal habeas court can grant relief.
15 *Williams*, 529 U.S. at 405. A state court decision will be contrary
16 to clearly established Supreme Court precedent if the state court
17 applies a rule of law that contradicts the established Supreme Court
18 rule, or fails to arrive at the same result as clearly established
19 Supreme Court precedent in a case with materially identical facts.
20 *Id.* The "unreasonable application" prong is determined, not by
21 reference to a "reasonable jurist" standard, but by analyzing the
22 question of whether the application was "objectively unreasonable"
23 (as opposed to an incorrect or erroneous application). *Id.* at 409.

24 The role of circuit law in the federal habeas review process is
25 limited. A federal district court may use similar cases from the
26 Ninth Circuit and other circuits to help determine whether Supreme
27 Court law on a particular subject is "clearly established" and
28 whether a state court decision is within the scope of "reasonable"

1 applications of Supreme Court law, but a federal district court
2 cannot overturn a state court decision on habeas review because of
3 a conflict with circuit law. *Van Tran v. Lindsey*, 212 F.3d 1143,
4 1154 (9th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000), (*overruled*
5 *on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003); *Duhaime*
6 *v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999)).

7 State courts are not required to cite Supreme Court law or even
8 be aware of an applicable Supreme Court case, so long as neither the
9 reasoning nor the result of the state court decision contradicts
10 that law. *Early v. Packer*, 537 U.S. 3, 8 (2003). The last reasoned
11 decision of the state court is the opinion which is reviewed. *Ylst*
12 *v. Nunnemaker*, 501 U.S. 797, 803-04 (1991).

13 **CLAIM ONE: INEFFECTIVE ASSISTANCE OF COUNSEL**

14 Plaintiff asserts his counsel was ineffective at trial,
15 specifying four factual bases for this claim: (1) trial counsel did
16 not request a lesser included offense jury instruction for the
17 robbery charge; (2) trial counsel did not request a lesser included
18 offense jury instruction for the attempt to elude charge; (3) trial
19 counsel erroneously requested a voluntary intoxication jury
20 instruction that was not supported by the evidence; and (4) trial
21 counsel failed to interview and call defense witnesses who would
22 have corroborated the defense theory of diminished capacity. (Ct.
23 Rec. 1, 5.)

24 In addressing the ineffective assistance of counsel issue, the
25 Court of Appeals stated the following:

26 In his personal restraint petition, Mr. O'Connell
27 contends he had ineffective assistance of trial counsel.
28 He argues that defense counsel (1) failed to investigate,
interview, or call witnesses crucial to his defense; (2)
requested an instruction on voluntary intoxication that

1 was not supported by the evidence; and (3) failed to
2 request lesser included instructions.

3 Because effective assistance of counsel in criminal
4 proceedings is guaranteed by the sixth amendment of the
5 United States Constitution and article I, section 22 of
6 the Washington State Constitution, Mr. O'Connell raises a
7 constitutional challenge in his collateral attack. *In re*
8 *Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72 (2004).
9 Accordingly, he must demonstrate by a preponderance of the
10 evidence that he was actually and substantially prejudiced
11 by the error. *Id.* To prove ineffective assistance of
12 counsel, he must first show that defense counsel's
13 representation fell below an objective standard of
14 reasonableness. *Id.* at 672. Second, he must show that
15 his deficient representation actually prejudiced him. *Id.*
16 at 672-73. Failure to establish either one of these tests
17 defeats his claim. *Id.* at 673. Judicial scrutiny of
18 counsel's performance is highly deferential because there
19 is a strong presumption of effectiveness. *Id.* at 721.

20 (Exhibit 3, 9-10.) (Parallel citations omitted.)

21 The question, under the standard of the AEDPA, is whether the
22 state court's analysis of the ineffective assistance of counsel
23 claims was contrary to or an unreasonable application of established
24 law as determined by the Supreme Court law. 28 U.S.C. § 2254(d)(1).
25 The standard for effective assistance of counsel as enunciated in
26 *Strickland v. Washington*, 466 U.S. 668 (1984), is "clearly
27 established" Supreme Court law. *Williams*, 529 U.S. at 391. In
28 *Strickland*, the Court held that to prove a claim of ineffective
assistance of counsel, a petitioner must show that (1) defense
counsel's representation fell below an objective standard of
reasonableness based on consideration of all the circumstances, and
(2) defense counsel's deficient representation prejudiced the
defendant, "i.e., there is a reasonable probability that, except for
counsel's unprofessional errors, the result of the proceeding would
have been different." *Strickland*, 466 U.S. at 694. A counsel's
deficient performance must be so serious "that counsel was not

1 functioning as the 'counsel' guaranteed the defendant by the Sixth
2 Amendment," and so serious as "to deprive the defendant of a fair
3 trial, a trial whose result is reliable." *Id.* at 687. In assessing
4 Petitioner's ineffective assistance claim, the court need not assess
5 counsel's performance before examining the prejudice suffered. *Id.*
6 at 697. If the ineffectiveness claim can be addressed due to lack
7 of sufficient prejudice, "that course should be followed." *Id.*

8 Claims of ineffective assistance of counsel are mixed questions
9 of law and fact. See *Dubria v. Smith*, 224 F.3d 995, 1000 (2000).
10 If this court determines error has occurred, the harmless error
11 analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), need
12 not be conducted, because "[t]he *Strickland* prejudice analysis is
13 complete in itself; there is no place for an additional harmless
14 error review." *Jackson v. Calderon*, 211 F.3d 1148, 1154 n.2 (9th
15 Cir. 2000), *cert. denied.*, 531 U.S. 1072 (2001).

16 In this case, the Court of Appeals relied on *In re Pers.*
17 *Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004), as the legal
18 standard in its analysis for determining ineffective assistance of
19 counsel. (Ex. 3 at 10, 12, 17.) In *Davis*, the Washington State
20 Supreme Court thoroughly discussed the constitutional right to
21 effective assistance of counsel and applied the two-prong test
22 announced in *Strickland*. *Davis*, 152 Wn.2d at 672-73 (quoting
23 *Strickland*, 466 U.S. at 694). There is no dispute the state court
24 relied on the *Strickland v. Washington* standard as applied *In re*
25 *Davis*, in its determinations regarding Petitioner's claim of
26 ineffective assistance of counsel. For purposes of § 2254(d)(1),
27 the state court applied clearly established Supreme Court precedent.
28 See *Early*, 537 U.S. at 8.

1 **A. Factual Predicate One and Two**

2 Petitioner first contends his trial counsel was ineffective
3 because he did not request jury instructions for first degree theft
4 as a lesser included offense of first degree robbery and a jury
5 instruction for reckless driving as a lesser included offense of
6 attempting to elude a police vehicle. (Ct. Rec. 2 at 2.)

7 The Court of Appeals applied established state law in its
8 analysis of the lesser included offense instructions and found the
9 evidence did not support either lesser offense. The appellate court
10 analyzed the issue as follows:

11 Finally Mr. O'Connell contends trial counsel unreasonably
12 failed to request instructions on lesser included
13 offenses. It is true that a defendant has a right to have
14 lesser included offenses presented to the jury. RCW
15 10.61.006; *State v. Stevens*, 158 Wn.2d 304, 310 (2006).
16 A lesser included offense instruction is justified if (1)
17 all the elements of the lesser offense are necessary
18 elements of the charged offense (the legal prong), and (2)
19 the evidence supports an inference that the lesser crime
20 was committed (the factual prong). *Stevens*, 158 Wn.2d at
21 310. To prove ineffective assistance of counsel, Mr.
O'Connell must show that trial counsel unreasonably and
prejudicially pursued an "all or nothing" defense against
the charged crimes rather than propose lesser included
instructions. Compare *State v. Ward*, 125 Wn. App. 243,
250 (2004) (all or noting defense unreasonable when it
exposes the defendant to an unreasonable risk that the
jury will convict on the only option presented) with *State*
v. Hoffman, 116 Wn.2d 51, 112-13 (1991) (foregoing a
lesser included offense instruction may be a legitimate
trial strategy).

22 Mr. O'Connell argues that defense counsel should have
23 proposed an instruction on first degree theft as a lesser
24 included offense of first degree robbery. First degree
25 theft is defined as wrongfully taking property or services
26 from the person of another with intent to deprive him or
27 her of such property or services. RCW 9A.56.020(1)(a),
28 .030. A person commits first degree robbery when he or
she "unlawfully takes personal property from the person of
another or in his presence against his will by the use or
threatened use of immediate force, violence or fear of
injury to that person." RCW 9A.56.190. "Such force or
fear must be used to obtain or retain possession of the
property, or to prevent or overcome resistance to the

1 taking." *Id.* Any force or threat, even slight, is
2 sufficient to sustain a robbery conviction. *State v.*
Handburgh, 119 Wn.2d 284, 293 (1992).

3 Although Mr. O'Connell contends he was entitled to
4 instruct the jury on first degree theft, the record does
5 not support the factual prong of this lesser included
6 offense. His victim testified that Mr. O'Connell
7 threatened to rape and kill her, fought with her, pushed
8 her out of her car, and then hit her arm when he backed up
9 the car. Even if the defense had been successful in
10 discrediting her testimony, an officer testified that she
11 had obvious injuries. Because the record shows both use
12 and threatened use of violence, first degree theft is not
13 a justified lesser included offense. Trial counsel's
14 failure to propose such an instruction was a legitimate
15 trial strategy and was not prejudicial. *State v. King*, 24
16 Wn.App 495, 498-99 (1979).

17 Finally Mr. O'Connell contends trial counsel should
18 have proposed an instruction on reckless driving as a
19 lesser included offense of attempt to elude a police
20 vehicle. Former RCW 46.61.024 (1983), the attempt to
21 elude statute, states that "[a]ny driver of a motor
22 vehicle who wilfully fails or refuses to immediately bring
23 his vehicle to a stop and who drives his vehicle in a
24 manner indicating a wanton or wilful disregard for the
25 lives or property of others while attempting to elude a
26 pursuing police vehicle, after being given a visual or
27 audible signal to bring the vehicle to a stop, shall be
28 guilty of a class C felony." Reckless driving, a
misdemeanor, involves driving a vehicle in "willful or
wanton disregard for the safety of persons or property."
RCW 46.61.500(1). Both statutes require a willful or
wanton disregard for the safety of others. Thus, it is
impossible to violate the eluding statute without
violating the reckless driving statute, and reckless
driving is a lesser included offense of eluding. See
State v. Parker, 102 Wn.2d 161, 164-65 (1984)(discussing
former RCW 46.61.024 (1979)).

21 Additional mental elements for attempt to elude,
22 however, are willful failure to stop and attempting to
23 elude a pursuing police vehicle. RCW 46.61.024; *Parker*,
24 102 Wn.2d at 165. Mr. O'Connell offered no evidence at
25 trial to rebut the State's evidence that he began speeding
26 when the marked police car that first followed him turned
27 on its lights. Eventually, more than one police vehicle
28 pursued him. An officer testified that Mr. O'Connell
reached speeds of 70 to 80 miles per hour as he swerved
around corners and drove west on Sprague Avenue toward
downtown Spokane. Considering the strength of this
unrebutted evidence for refusal to stop, the record does
not support the factual prong for a lesser included
offense instruction on reckless driving. *Stevens*, 158

1 Wn.2d at 310. Accordingly, defense counsel's failure to
2 propose such an instruction was neither unreasonable nor
prejudicial. *Davis*, 152 Wn.2d at 673.

3 (Exhibit 3 at 14-17.) (Parallel citations omitted.)

4 In his argument that he was entitled to lesser included
5 instructions, Petitioner mistakenly relies on *Beck v. Alabama*, 447
6 U.S. 625 (1980). Although it is clearly established federal law
7 that a defendant is entitled to an instruction on a lesser-included
8 offense in a capital case, *Hopper v. Evans*, 456 U.S. 605, 611
9 (1982); *Beck*, 447 U.S. at 628, it is not "clearly established"
10 Supreme Court law that due process requires giving a lesser included
11 instruction in non-capital cases. *Solis v. Garcia*, 219 F.3d 922,
12 929 (9th Cir. 2000). Petitioner's case is a non-capital case. Under
13 Ninth Circuit law, the failure to instruct on lesser-included
14 offenses in a non-capital case does not present a federal
15 constitutional question. *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th
16 Cir. 1998). Therefore, Petitioner is not entitled to habeas relief
17 for his ineffective assistance of counsel claims based on failure to
18 request jury instructions on lesser included offenses.³

19 _____
20 ³ Petitioner also relies on *Keeble v. United States*, 412 U.S.
21 205 (1973). (Ct. Rec. 2 at 2.) This reliance is misplaced. *Keeble*
22 challenged the denial of a lesser included jury instruction in the
23 prosecution of a federal crime under the Major Crimes Act of 1885;
24 it was not a federal habeas case. Further, under the federal rule
25 applied in claims for habeas relief in capital cases, a defendant is
26 entitled to a lesser included offense only if the facts so warrant.
27 *Id.* at 208. Even if habeas relief were available in this case, the
28 evidence does not warrant a lesser included instruction. The record

1 Accordingly, **IT IS RECOMMENDED**, habeas relief based on counsel's
2 failure to request lesser included offense jury instructions be
3 **DENIED**.

4 **B. Factual Predicate Three - Voluntary Intoxication Instruction**

5 Petitioner next contends his counsel's request for a voluntary
6 intoxication jury instruction was prejudicial error that confused
7 the jury and affected the outcome of the trial. He asserts there
8 was no factual basis for the instruction, and it conflicted with his
9 defense theory of diminished capacity. (Ct. Rec. 2 at 11-20.)

10 The appellate court rejected this argument, reasoning as
11 follows:

12 Defense counsel argued that Mr. O'Connell was either
13 intoxicated on the night of the incident or was
14 incapacitated due to long-term drug abuse. Mr. O'Connell
15 now contends this defense was confusing and the jury could
16 have thrown out the diminished capacity defense if it did
17 not believe he was intoxicated. The record simply does
18 not indicate that these two aspects of the defense based
19 on lack of intent were difficult to separate.

20 Voluntary intoxication is a subset of the general
21 defense of diminished capacity. *State v. Eakins*, 127
22 Wn.2d 490, 498 (1995). The defense is effective when the
23 defendant can show that the crime charged has as an
24 element a particular mental state, that he or she had been
25 drinking or consuming drugs, and that the consumption
26 affected his ability to acquire the required mental state.
27 *State v. Gabryschak*, 83 Wn.App. 249, 252 (1996). To show
28 diminished capacity, the defendant must produce expert
testimony demonstrating he or she suffered from a mental
condition that impaired his or her ability to form the
requisite specific intent. *State v. Turner*, 143 Wn.2d
715, 730 (2001); *Eakins*, 127 Wn.2d at 502. As noted by

includes un rebutted evidence of the infliction of bodily harm in the
commission of theft, a refusal to stop when so instructed by the
police, and driving in a manner indicating wanton and willful
disregard for the lives of others while attempting to elude police.
Hopper, 456 U.S. at 611-12.

1 the State, the jury could have rejected the diminished
2 capacity defense due to the lack of a mental condition,
3 yet could have accepted the witnesses' testimony that Mr.
4 O'Connell was intoxicated at the time of the incident.
5 Defense counsel discussed both theories in closing
6 argument, and the jury addressed separate instructions on
7 the defenses. Mr. O'Connell shows neither an unreasonable
8 defense strategy nor prejudice.

9 (Exhibit 3 at 13-14.)

10 To challenge a jury instruction on habeas, the defendant must
11 prove "the ailing instruction by itself so infected the entire
12 trial that the resulting conviction violates due process." *Estelle*
13 *v. McGuire*, 502 U.S. 62, 72 (quoting *Cupp v. Naughten*, 414 U.S. 141,
14 147 (1973)). The instruction must be viewed in the context of the
15 entire trial and the jury instructions taken as a whole. *Id.*; see
16 also *Strickland*, 466 U.S. at 685 (counsel error must result in
17 unfair trial to violate due process).

18 Here, the appellate court found that under state law, voluntary
19 intoxication is a subset of the diminished capacity defense.
20 (Exhibit 3 at 13.) This court has no authority to review a state
21 court's application of its own laws. *Jackson v. Ylst*, 921 F.2d 882,
22 885 (9th Cir. 1990). The appellate court determined the instruction
23 was reasonable and correct in defining the two aspects of the
24 defense: mental condition and voluntary intoxication. The jury was
25 instructed that evidence of intoxication "may be considered in
26 determining whether the defendant acted with the intent to commit
27 the crimes [charged]." (Exhibit 15 at 191.) It was not an
28 unreasonable strategy for defense counsel to propose two possible
bases for lack of intent. Under the instructions given by the trial
court, Petitioner was able to argue fully that he did not have the
requisite mental state to commit either crime. The instruction as

1 given did not create fundamental unfairness by denying Petitioner an
2 opportunity to present his theory of the case to the jury. Because
3 there is no showing of a due process violation, the claim is not
4 cognizable on federal habeas review. *See Beardslee v. Woodford*, 358
5 F.3d 560, 578 (9th Cir. 2004), *cert. denied*, 543 U.S. 842 (2004);
6 *Solis v. Garcia*, 219 F.3d 922, 927 (9th Cir. 2000), *cert. denied*, 534
7 U.S. 839 (2001); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir.
8 1984), *cert. denied*, 469 U.S. 838 (1984) (habeas relief unavailable
9 unless contested jury instruction, viewed in context of entire
10 trial, denied due process).

11 Petitioner's argument that there is no factual basis for the
12 voluntary intoxication jury instruction is without merit. The
13 victim testified Petitioner used crack cocaine and was acting
14 unusually agitated and demanding money the night of the crime.
15 (Exhibit 15 at 53.) The witness who helped the victim immediately
16 after the crime, testified the victim stated her assailant was on
17 crack that night. (*Id.* at 101.) Petitioner's medical expert
18 testified that Petitioner reported he was using methamphetamine,
19 crack and alcohol at the time of the crime. (*Id.* at 114.) Evidence
20 submitted by Petitioner with his PRP also shows Petitioner was
21 intoxicated the night of the crime. (Exhibit 8, Appendix C,
22 *Affidavit of Elmer O'Connell, Sr.*) The appellate court reasonably
23 found there was sufficient evidence favorable to the State to
24 establish beyond a reasonable doubt the essential elements of first
25 degree robbery and attempting to elude a police vehicle, including
26 intent. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (habeas
27 relief unavailable if, viewing the record in light most favorable to
28 the State, any rational trier of fact could have found the essential

elements of the crimes charged). Further, Petitioner's argument that the instruction could have confused the jury is speculation. There is no evidence in the record to indicate the instruction on voluntary intoxication was erroneous. There is no evidence in the record that creates an inference of jury confusion. *Beardslee*, 358 F.3d at 575. Petitioner has not shown "'a reasonable likelihood that the jury . . . applied the challenged instruction in a way' that violated the Constitution." *Solis*, 219 F.3d at 927 (quoting *Estelle*, 502 U.S. at 72).

Because there was evidence of intoxication, as found by the state court, and no evidence that the jury misapplied the instruction, Petitioner failed to establish prejudice resulting from the voluntary intoxication instruction. Further, it was reasonable for counsel to argue two bases for diminished capacity. The appellate court reasonably found no prejudice was shown; therefore, there is no constitutional violation. *Strickland*, 466 U.S. at 697. **IT IS RECOMMENDED** habeas relief based on counsel's request for a voluntary intoxication instruction be **DENIED**.

C. Factual Predicate Four - Failure to Interview and Call Witnesses

Petitioner next claims trial counsel did not sufficiently interview defense witnesses or call them during trial. He claims his counsel should have presented testimony from three people who would have provided evidence to support his defense theory. (Ct. Rec. 2 at 20.)

The appellate court considered affidavits submitted by Petitioner's family and friends in support of Petitioner's PRP claim that defense counsel did not conduct a reasonable investigation.

1 (Exhibit 3 at 12-13; Exhibit 8, Appendices A-F; Ct. Rec. 15,
2 Exhibits A, B, C.) The appellate court stated:

3 Mr. O'Connell admitted that he had taken his
4 acquaintance's car, but claimed that he lacked the intent
5 to rob her or to elude police because of diminished
6 capacity and/or voluntary intoxication. The affidavits he
7 presents are from family members and friends who allege
8 that trial counsel would not return their calls and that
9 they wanted to testify that Mr. O'Connell was a nice man
10 who would not hurt or steal from anyone. His father
11 declared that Mr. O'Connell was intoxicated on the night
12 of the incident, a defense Mr. O'Connell is now rejecting.
13 Considering the reasonable defense of incapacity chosen by
14 trial counsel, the testimony of these witnesses would not
15 have been necessary or particularly helpful. Even if
16 these prospective witnesses could have described the state
17 of Mr. O'Connell's mind at the time of the incident, their
18 testimony would have been redundant. Both defense and
19 State witnesses testified that Mr. O'Connell appeared
20 agitated, spent long periods of time in the bathroom, and
21 had a history of drug abuse. Further, if the family
22 members and friends testified as to his good character,
23 the prosecutor could have cross-examined them regarding
24 their knowledge of his extensive criminal history. *State*
25 *v. Lord*, 117 Wn.2d 829, 891-92 (1991). Mr. O'Connell
26 fails to show that trial counsel's investigation was
27 inadequate or that it prejudiced his defense.

28 (Exhibit 3 at 12-13.)

It is well established "counsel has a duty to make reasonable
investigations or to make a reasonable decision that makes
particular investigations unnecessary." *Strickland*, 466 U.S. at
691. Although "[j]udicial scrutiny of counsel's performance must be
highly deferential," *id.* at 689, "we have found counsel to be
ineffective where he neither conducted a reasonable investigation
nor made a showing of strategic reasons for failing to do so,"
Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). "[A] lawyer
who fails adequately to investigate, and to introduce into evidence,
[evidence] that demonstrate[s] his client's factual innocence, or
that raise[s] sufficient doubt as to that question to undermine
confidence in the verdict, renders deficient performance." *Hart v.*

1 *Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999), *cert. denied*, 528 U.S.
2 929 (1999) (finding defense counsel's performance deficient because
3 he failed to review or introduce at trial documents corroborating
4 defense witness's testimony); *see also Lord v. Wood*, 184 F.3d 1083,
5 1096 (9th Cir. 1999), *cert. denied*, 528 U.S. 1198 (2000) (finding
6 defense counsel's performance deficient because he failed to
7 interview or call at trial three witnesses who had told police and
8 investigators that they saw the victim alive a day after the
9 defendant allegedly killed her); *Sanders*, 21 F.3d at 1457 (finding
10 defense counsel's performance deficient because he failed to
11 investigate or introduce at trial evidence implicating his client's
12 brother).

13 As discussed by the appellate court, the submitted affidavits
14 do not contain factual evidence that was not brought out at trial.
15 On the contrary, the submitted statements confirmed that Petitioner
16 was looking for money for more drugs, was intoxicated, and was
17 behaving in an aggressive manner, to the point his family was
18 telling him to get out or let them take him to the hospital.
19 (Exhibit 15, *Affidavits*.) The affidavit of Elmer O'Connell, Sr.,
20 confirms that he spoke to trial counsel about the events of that
21 evening. As found by the appellate court, it was reasonable for
22 counsel to avoid putting family and friends on the stand to testify
23 about Petitioner's character, as this would allow cross-examination
24 by the prosecutor into Petitioner's past criminal history. (Exhibit
25 3 at 12-13.) Evidence from Petitioner's family that would support
26 either a diminished capacity or intoxication defense was
27 unnecessary, as evidenced by the psychologist's testimony, and other
28 witness testimony that Petitioner was intoxicated the night of the

1 crime, as well jury instructions on both topics. (Exhibit 15 at
2 191.) Petitioner failed to show trial counsel's investigation and
3 witness selection was unreasonable or caused prejudice. Thus, **IT IS**
4 **RECOMMENDED** habeas relief based on this claim **BE DENIED**.

5 As to all factual grounds involving Petitioner's ineffective
6 assistance of counsel claim, the state court decision was neither
7 contrary to nor an unreasonable application of clearly established
8 law. Accordingly, **IT IS RECOMMENDED** habeas relief on the
9 ineffective assistance of counsel claim be **DENIED**.

10 **CLAIM TWO: CUMULATIVE ERROR**

11 Petitioner asserts he is entitled to habeas relief based on
12 cumulative error. (Ct. Rec. 2 at 32.) Petitioner asserts all of
13 the claims asserted in his habeas petition constitute sufficient
14 cumulative error to warrant habeas relief.

15 "Although no single alleged error may warrant habeas corpus
16 relief, the cumulative effect of errors may deprive a petitioner of
17 the due process right to a fair trial." *Jackson v. Brown*, 513 F.3d
18 1057, 1085 (9th Cir. 2008); *Karis v. Calderon*, 283 F.3d 1117, 1132
19 (9th Cir. 2002); *see also Whelchel v. Washington*, 232 F.3d 1197, 1212
20 (9th Cir. 2000) (noting cumulative error applies on habeas review);
21 *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984), *cert. denied*,
22 470 U.S. 1050 (1989) ("[e]rrors that might not be so prejudicial as
23 to amount to a deprivation of due process when considered alone, may
24 cumulatively produce a trial setting that is fundamentally unfair").
25 Such is not the case here. Petitioner has not shown prejudicial
26 error which would warrant the application of the doctrine. The
27 record does not reflect that Petitioner was deprived of a fair trial
28 by the claimed errors. Accordingly, **IT IS RECOMMENDED** this claim be

1 **DISMISSED WITH PREJUDICE.**

2 Having addressed all of Petitioner's claims, **IT IS RECOMMENDED**
3 Respondent's Motion to Dismiss with prejudice be **GRANTED.**

4 **OBJECTIONS**

5 Any party may object to a magistrate judge's proposed findings,
6 recommendations or report within ten (10) days following service
7 with a copy thereof. Such party shall file written objections with
8 the Clerk of the Court and serve objections on all parties,
9 specifically identifying the portions to which objection is being
10 made, and the basis therefor. Any response to the objection shall
11 be filed within ten (10) days after receipt of the objection.
12 Attention is directed to FED. R. CIV. P. 6(d), which adds additional
13 time after certain kinds of service.

14 A district judge will make a de novo determination of those
15 portions to which objection is made and may accept, reject, or
16 modify the magistrate judge's determination. The judge need not
17 conduct a new hearing or hear arguments and may consider the
18 magistrate judge's record and make an independent determination
19 thereon. The judge may, but is not required to, accept or consider
20 additional evidence, or may recommit the matter to the magistrate
21 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621
22 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P. 72;
23 LMR 4, Local Rules for the Eastern District of Washington.

24 A magistrate judge's recommendation cannot be appealed to a
25 court of appeals; only the district judge's order or judgment can be
26 appealed.

27 The District Court Executive is directed to file this Report
28 and Recommendation and provide copies to Petitioner, counsel for

1 Defendant and the referring district judge.

2 DATED February 3, 2009.

3
4 S/ CYNTHIA IMBROGNO
5 UNITED STATES MAGISTRATE JUDGE
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